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No. 92-601

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

AARON DePUE COTTLE,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

I. WAS PETITIONER DENIED DUE PROCESS AND TRIAL BY IMPARTIAL JURY?

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STATEMENT OF THE CASE

Petitioner incorporates herein the Statement of the Case as set out in his Petition. Certain factual assertions made by respondent in its Brief in Opposition to Petition are in error and merit mention.

ARGUMENT

A close reading of the Petition and the Brief in Opposition to Petition, taken together, reveals that neither the facts nor the law relied upon by petitioner are directly addressed by respondent. The central facts upon which the Petition for Writ of Certiorari is based and which are set out at length therein are ignored altogether by respondent, while it examines at length still other evidence presented by petitioner, as though that evidence may be easier to attack. Nonetheless, certain factual inaccuracies are contained in the Brief in Opposition, some of which are hereinafter pointed out.

First, respondent says on page 4, regarding the post-trial hearing, that "[t]estimony was heard regarding certain jurors, transcripts of the voir dire process were examined, *and briefs were submitted on this issue.*" (emphasis supplied) The italicized language is incorrect. Briefs had been previously filed on the right to such a hearing, but no briefs were permitted following the hearing, which adjourned July 5, 1990. As the hearing concluded, the trial judge said: "This is the last of the motions that are pending and I'll advise counsel of my decision very promptly. I have your earlier memos. It's not necessary for anything else to be submitted in this decision. We will

stand adjourned." [Tr. 7-5-90, p. 161] Without briefs or transcript, the decision was rendered 5-1/2 months later, in which evidence still ignored by respondent, as discussed in the Petition, was not addressed.

Second, respondent says on page 6 that "[t]he fact that Mr. Garrett and Mr. Tatterson joined in the unanimous verdict to acquit Dr. Cottle on four of the seven counts of sexual abuse supports the finding that they were not out to seek convictions. Dr. Cottle does not assert that a compromise verdict occurred." This is an almost cynical disregard of the testimony of Joyce Perrine relating to Jury Foreman Garrett discussing the jury deliberations in the presence of her and her husband and Rose Whytsell at Whytsell's home one evening in recess of deliberations.

According to Mrs. Perrine, "He [Garrett] was talking about that there was one juror holding out. He had eleven for yes and one for no and he said if he could not get him on all of those counts he would settle for three. He would get him on three counts." [Tr. 6-25-90, p. 46] Aside from the juror misconduct in discussing deliberations with friends, this glimpse into the deliberations themselves and this small part of Garrett's maneuvers in the jury room should disabuse respondent's – and the trial judge's – naiveté about Garrett's and Tatterson's votes for acquittal on four counts "supporting the finding that they were not out to seek convictions."

The trial court, incidentally, recalled this testimony as "one juror was holding out and that the defendant probably would be convicted on three counts." [Appendix A, p. 22a] This memory of the testimony is far different from

"if he could not get him on all of those counts he would settle for three." Of course, petitioner, being prevented by law from presenting evidence of the actual jury deliberations, has no way to assert or prove any compromise verdict, as respondent well knows, and does not rely upon a compromise verdict on this appeal. The evidence of juror pre-trial prejudice is heavily corroborated by this testimony of misconduct (which Garrett, incidentally, denied) but was ignored for this purpose by the trial court.

Third, without any discussion of the trial evidence, respondent makes the sweeping assertion on pages 6 and 7 that Dr. Cottle "was convicted upon the counts which were supported by strong and credible evidence and acquitted upon those counts which lacked sufficient evidence." That is simply not the case. Petitioner was convicted on alternating counts one, three and five. The evidence for three of the other counts was virtually identical with the evidence for counts one and five, being the contradicted and uncorroborated testimony of the girl in question as to each count. In fact, the weakest evidence of all was under count three, which resulted in a conviction despite the evidence of the medical records, nursing notes and nurse's testimony, all of which demonstrated that the event as described in the girl's testimony could not possibly have occurred. [Tr. 8-28/31-89, pp. 141-201; Tr. 9-6-89, pp. 151-161; Tr. 9-11-89, pp. 38-48]

Fourth, respondent says on page 11 that Barbara Alvis, referring to jury foreman Garrett, "testified that she *believed* Mr. Garrett blamed Dr. Cottle for not saving his brother's life." (emphasis supplied) This was not Alvis's testimony. Her testimony, which was detailed and

clear on the point, included the following: "Q – Described the words that Mr. Garrett used in referring to Dr. Cottle? A – He said he was going to get the son-of-a-bitch. Q – Did you ask Mr. Garrett what he was talking about or what he meant? A – Yes. Q – What did he say? A – He said for killing his brother. * * * A – Joe felt that Dr. Cottle did not do certain things at the accident." [Tr. 7-5-90, p. 47] Alvis did not merely express her belief, but directly related Garrett's clear expressions of blame and intent to gain revenge.

Finally, respondent cites opinions and principles that are inapplicable to the issue of this case.

A possible explanation for the erroneous conclusion reached by the trial court in apparently requiring proof of prejudice by convincing evidence, and reiterated by respondent, can be found in the apparent failure of the trial court to recognize the distinction in the applicable burden of proof between errors of a constitutional nature which justify relief in the trial court and on direct appeal, and such errors which justify relief in federal habeas corpus. There is a huge difference. The failure to recognize this difference might explain why respondent has clearly misstated the "QUESTION PRESENTED FOR REVIEW" on page i of its Brief In Opposition to Petition.

In the case of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), violations of the exclusionary rule by a trial court were found to be insufficient to justify relief in federal habeas corpus although such errors, without more, would have required reversal upon direct appeal. In a federal habeas corpus which is a collateral attack upon a judgment of conviction in a state

court, the federal court must accord great deference to factual determinations made by the state court and the federal court is required to deny the writ in such cases unless it can conclude that the state court's findings lack even fair support in the record. This result is mandated by the express provisions of 28 U.S.C. § 2254(d). *Marshall v. Lonberger,* 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1982). See also *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct.940, 71 L.Ed.2d 78 (1982), from which the trial court in its opinion [Appendix A of Petition, p. 25a] quoted with approval and which was referred to on page 5 of respondent's Brief In Opposition. That code section reads, in pertinent part, as follows:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties . . . shall be presumed to be correct . . . unless the court concludes . . . that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

In our case, however, we are on direct appeal and the judgment of the trial court is not being attacked collaterally. The court below found that errors occurred in several particulars [see Appendix A to Petition] but concluded that all of such errors, even considered cumulatively, were non-prejudicial to petitioner. We deal

here with petitioner's constitutional right under the Sixth Amendment to a trial by a fair and impartial jury and in such cases it is federal law, rather than state law, which determines whether an error in a state criminal trial is harmless. This Court has held repeatedly that an error involving the denial of a federal constitutional right in a state criminal case cannot be held harmless unless the reviewing court is satisfied *beyond a reasonable doubt* that the error did not contribute to the defendant's conviction. *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct.453, 78 L.Ed.2d 267 (1983); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

We respectfully suggest that it is impossible to conclude beyond a reasonable doubt, from a fair and full consideration of all of the evidence offered on the question, that Joe Bob Garrett and Dean Tatterson were impartial jurors. We urge this Court to conclude, because petitioner was entitled to a full panel of twelve qualified jurors, that the trial court, in denying our Motion For New Trial, and in failing to consider competent and unrefuted evidence of pre-trial bias on the part of two jurors, denied petitioner his Fifth and Sixth Amendment rights as set forth in our Petition for Certiorari.

CONCLUSION

For these reasons and all of the reasons set out in the Petition heretofore filed, petitioner respectfully urges this Court to grant the petition and reverse the West Virginia Supreme Court of Appeals' denial of his petition for appeal and to grant petitioner a new trial.

Dated: December 16, 1992.

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